85-1327

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HARDAWAY CONSTRUCTORS, INC.
Petitioner,

VERSUS

JOSEPH DANIEL BROWNING, JR.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a bridge construction worker working on a fixed platform which is part of a highway bridge is covered under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§901, et seq., particularly §§902(3) and (903).

2. Whether a bridge construction company is liable under §905(b) of this Act for the death of an employee caused by the operational negligence of a fellow employee under the decedent's control.

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 28.1 of the Rules of this Court, the parties to the proceedings are:

1. Joseph Daniel Browning, Jr.
   Stewart F. Browning
   Larry Wayne Browning
   Karen B. Kirksey
   Debra B. Goodroe and
   Atwood Alan Browning,
   as survivors of Joseph D. Browning

2. Hardaway Constructors, Inc as successor to
   B. F. Diamond Construction Co.

3 Continental Corporation, as parent of an insurer of Hardaway Constructors, Inc.

4. Xerox Corporation, as parent of an insurer of Hardaway Constructors, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Hardaway Constructors, Inc. petitions this Court for a Writ of Certiorari to review the judgment and decree of the Supreme Court and the Court of Appeals of the State of Georgia in this case. Petitioner was a petitioner in that court in the final analysis and was a defendant in the original trial before the Superior Court of Muscogee County, Georgia.

OPINIONS BELOW

The opinion of the Court of Appeals for the State of Georgia is recorded at 176 Ga. App. 530, 336 S.E.2d 579 (1985), cert. denied, Supreme Court of Georgia, Ga. , 336 S.E.2d (1985). Petitioner timely applied for a rehearing. This application was denied on December 19, 1985. The decision of the Court of Appeals is set forth in the Appendix to this Petition.

JURISDICTION

The opinion of the Court of Appeals was handed down on October 9, 1985. A timely motion for rehearing was denied on October 23, 1985. A petition for writ of certiorari was denied by the Supreme Court of Georgia on November 26, 1985 and a timely motion for rehearing thereon was denied on December 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

STATUTE INVOLVED

Sections 2 (3) and 2 (4) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§902 (3) and 902 (4)) provides, in pertinent parts:

> (3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker* . . . .
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).*

§3 (a) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §903 (a)) provides in pertinent part:

> Sec. 3. (a) Composition (sic) shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States *(including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)* . . . .

§5 (b) of the Longshore and Harbor Workers' Compensation Act (33 U.S.C.§905 (b)) provides in pertinent part:

> *(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occured. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.*

STATEMENT OF THE CASE

Browning was a superintendent for Hardaway Constructors, Inc., a bridge construction company. Browning was marking engineering points on a piling cap. This cap joined together the tops of four concrete pilings driven into a riverbed. From it uprights were to be constructed a support for the surface of a bridge. The bridge is now a part of the Florida highway system.

Hardaway had a tug at the site. It was operated by an employee assigned to Browning. The tug had delivered another worker to the work site at Browning's command. This operator struck a barge with the tug. The impact or wave action broke a cable causing a cage of reinforcing rods on a nearby piling cap to fall and crush Browning against the floor of the cap upon which he was standing. Browning's tug operator was not shown to be incompetent or to have negligently operated the tug on any prior occasion.

In the suit below, Browning has been permitted to sue Hardaway for his worker's negligent operation of a tug though the tug operation was an integral part of the bridge construction project.

Pursuant to Rule 21.1 (h) the issues were raised below:

1. On the first question, maritime employment, by original answer and ultimate determination after your Petitioner's motion for summary judgment which was upheld on appeal. *Browning v. B. F. Diamond Const. Co.*, 289 S.E.2d 268 (Ga. 1982), cert. denied, 459 U.S. 837 (1982). The §905 (b) pending action was abated until determination of the longshore claim. *Browning v. B. F. Diamond Const. Co.*, 676 F.2d 547 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983). The trial court below ruled the Eleventh Circuit decision to be the law of the case. This issue was vigorously reasserted to the Georgia court of appeals upon announcement of this

Court's decision in *Herb's Welding, Inc. v. Gray,* as published at 53 USLW 4275. Browning replied to that issue by his first supplemental brief on May 13, 1985. This should have been addressed by the Georgia appellate courts. *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, n. 16 (1982).

2. Regarding capacity to sue the employer, the second question, it was raised by your Petitioner's answer to the amended complaint which claimed a §905 (b) action, was the subject of Petitioner's motion for summary judgment [see p. 1a], the essence of a petitioner's requested charge modelled after *Helaire v. Mobil Oil Co.,* 709 F.2d 1031 (5th Cir. 1983) (T-612), its motion for directed verdict (T-437 et. seq.), and its appeal by enumeration of errors numbers 1 and 2, by briefs, and by decision [1a et. seq.].

REASONS FOR GRANTING THE WRIT

The decision below conflicts with decisions of this Court and opens employers to liability to their employees in a way markedly different from that contemplated by the Congress in enacting §905 (b). Employer liability is limited to vessels who act as their own stevedores or ship repairers and builders.[1] The first sentence of that section, after stating a vessel can be liable, reads "the employer shall not be liable to the vessel***." The case below, however, discards that restriction and holds that the employer's ownership of a tug or workboat in a land-based activity can expose him to this liability.

Recalling those litigious days of the *Sieraki-Ryan* triad speaks to the enormity of any breach in employer immunity beyond the language of the statute and of the compelling need for guidance by this Court.

[1] The 1984 Amendments add to the language of §5 (b) that those engaged in ship building, repairing, or breaking services may not sue their employer if he should be the vessel owner. 33 U.S.C. §905 (b).

PREAMBLE TO ARGUMENT ON REASONS

Benefits on account of this death were originally paid under the Florida Workers' Compensation Act. Browning's widow filed a claim under the Longshore and Harbor Workers' Compensation Act. The claim was denied by an administrative law judge on the reasoning that:

> At the time of the accident the employee was standing on top of a "footing" consisting of precast piles driven into the riverbed and capped by a small concrete platform. A cage formed by steel reinforcing rods and used to strengthen the concrete columns which would ultimately connect the footing to the superstructure bridge fell on top of the employee, crushing him to death. [Unpublished.]

The Benefits Review Board affirmed this decision. *Browning v. B. F. Diamond Const. Co.*, 14 BRBS 313 (1981). The Eleventh Circuit reversed. *Browning v. B. F. Diamond Const. Co.*, 676 F.2d 547 (1982), cert. denied, 459 U.S. 1170 (1983)[2] The Eleventh Circuit found the death compensable under the Longshore Act by reliance upon the statement of the claimant's counsel:

> I think the evidence will show if we were able to produce this live witness at the time - or could at least look and see what these people know - that at the time of the accident he was involved in directing the operations of this crane operator and in moving the steel forms into place***.[3]

676 F.2d at 549.

---

[2] A petition for modification under 33 U.S.C. §922 has been filed regarding compensability under the Longshore Act.

[3] This assertion of what counsel thought Browning was doing was proven untrue at the trial below. There was no unloading or crane activity at the time of injury. There are no remaining factual controversies in this case.

From this the court of appeals concluded "that Browning was engaged in longshoring activities cannot be avoided. It is enough that Browning was 'directly involved' in the unloading of a vessel at the time of his injury." 676 F.2d at 549-550.

After filing the longshore claim, Browning's widow (now deceased) instituted a suit in a Georgia court grounded upon the Jones Act and general maritime law. The decedent's employer, your Petitioner, obtained a summary judgment concluding this claim. This summary judgment was affirmed on appeal. *Browning v. B. F. Diamond Const. Co.*, 289 S.E.2d 268 (1982), cert. denied, 459 U.S. 837 (1982). During the pendency of that suit the widow amended to claim relief under 33 U.S.C. §905(b). That claim is the genesis of the present controversy.

The wrong sought to be corrected by this petition is whether or not there is a maritime employment and, if so, can an employer be liable under §905(b) of the Longshore Act to its own employee simply because a vessel was involved in operational negligence, *a fortiori*, when the work does not involve the enumerated activities of longshoring or ship building or repair.

ARGUMENT

I. *The bridge-building industry was not within the contemplation of the Congress in adopting the 1972 Amendments to the Longshore Act.*

No representative of the construction industry testified regarding the 1972 Amendments to the Act. Hearings before the Subcommittee on Labor on S. 2318, S. 525, and S. 1547. May 2, 10, 17, 24, and June 5, 1982.

At the time of both impact and effect, Browning was marking engineering points on an extension of the land or an artificial island. He was not "upon the navigable waters*** or [any] adjoining area customarily used***" for ship

activities as defined by §903(a). The decision below conflicts with *Herb's Welding, Inc. v. Gray,* 470 U.S. , 84 L.Ed.2d 406 (1985).

Gray was welding a gas flow line on a fixed platform. An explosion occurred. This Court recognized offshore drilling rig workers were not mentioned in the Act or its legislative history.

> We have never read "maritime employment" to extend so far beyond those actually involved in moving cargo between ship and land transportation. Both Caputo and P. C. Pfeiffer Co. make this clear and lead us to the conclusion that Gray was not engaged in maritime employment for purposes of the LHWCA. [footnote omitted].
>
> Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks. Gray's welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at a platform by boat. Tr of Oral Arg 56. He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the marine environment***.

_____U.S. at_____, 84 L.Ed.2d at 414-5.

So too with Browning. His, his tug operator's, and his employer's business was building a bridge.

II. *The decision below carves out a new class of employees who may sue their employers and conflicts with prior decisions of this Court.*

The Congress in 1972 preserved a covered employee's

common law remedy against a third party vessel so long as the injury was not caused by a fellow employee. *Jones and Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 76 L.Ed.2d 768 (1983). Only the *Yaka* exception to employer immunity was permitted.

> The first sentence of §5(b) authorizes a longshoreman whose injury is caused by the negligence of a vessel to bring a separate action against such a vessel as a third party. Thus, in the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel. The second sentence of §5(b) makes it clear that such a separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner. That sentence provides, "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." If §5(a) had been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence in §5(b) barring suits against owner-employers for injuries caused by fellow servants.

The history of the Act further refutes petitioner's contention that §5(a) of the Act bars respondent's suit under §5(b). Prior to 1972, this Court had construed the Act to authorize a longshoreman employed directly by the vessel to obtain a recovery from his employer in excess of the statutory schedule, even though §5 of the Act contained the same exclusive liability language as today. *Reed v. The Yaka,* 373 U.S. 410 (1963); *Jackson v. Lykes*

Brothers Steamship Co., 386 U.S. 731 (1967). Although the 1972 Amendments changed the character of the longshoreman's action against the vessel by substituting negligence for unseaworthiness as the basis for liability, Congress clearly intended to preserve the rights of longshoremen employed by the vessel to maintain such an action. The House Committee Report is unambiguous:

"The Committee has also recognized the need of special provisions to deal with a case where a longshoreman, shipbuilder, or repairman is employed directly by the vessel. In such case, notwithstanding the fact the vessel is the employer, the Supreme Court in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963); and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes the rights of an injured longshoreman, shipbuilder, or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor . . . . The Committee's intent is that the same principles should apply in determining the liability of the vessel which employs its own longshoreman, shipbuilders or repairmen as apply when an independent contractor employs such persons." HR Rep No. 92-1441, 92nd Cong., pp. 7-8 (1972) (footnotes omitted).

462 U.S. at 530-531.

Nothing in this case fits that criterion. A tug, the equivalent of a tractor at a land-based construction site, fortuitously struck an object causing a cable to break and reinforcing rods to fall. Browning was the tug operator's boss. All workers were fellow employees. All material belonged to the employer. All actions and forces were a part of the work.

There was no fortuitous, union-hall assignment of *Reed v. The Yaka.* The decision below holds that vessel involvement, *ipsi dixit,* despite only operational negligence in the business of the parties, rends the garment of employer immunity.

The error is made more apparent by the rule of *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156; 66 L.Ed.2d 1 (1981), which mandates vessel liability must be distinct from the on-going activities of the employer. The vessel activity in the case at bar was an integral part of the construction activity. Browning had ordered his tug operator to deliver another employee to his worksite.

The scope of §905(b) action is very narrow, at best. The first sentence allows a suit against a vessel but "the employer shall not be liable to the vessel . . . directly or indirectly . . ." The next two sentences further restrict any action by the "fellow servant" doctrine. That an employee can sue his employer at all depends upon the legislative history.

The decision below allows employer liability for acts of fellow servants and in work situations far beyond the clear Congressional scheme.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

JOHN E. HOUSER

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies hereof have been served upon Richard J. Harris, Esquire, Post Office Box 2784, Savannah, Georgia 31402, by U.S. Mail this 5th day of February, 1986.

Prepaid

John C. Houser

APPENDIX

IN THE COURT OF APPEALS OF GEORGIA

70509

HARDAWAY CONSTRUCTORS, INC. v. BROWNING et al

BENHAM, Judge

Appellee's decedent was killed while employed by appellant as a supervisor on a bridge construction project spanning a portion of the Gulf of Mexico near Destin, Florida. Appellee's predecessor filed suit against appellant under, among other theories, the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA § 901 et seq., alleging that appellant's negligent operation of one of its vessels was the proximate cause of the decedent's death. See 33 USCA § 905(b). After the appeals of various pretrial motions were exhausted (see 161 Ga. App. 73 (289 SE2d 268) (1982) (U.S. cert. denied, 459 U.S. 837) and 676 F2d 547 (1982)), a jury found appellant's negligence to be the sole proximate cause of the decedent's death and awarded his estate and heirs $410,687 to which the trial court added an award of pre-judgment interest. Appellant now questions the denial of its motions for summary judgment and judgment notwithstanding the verdict/new trial, and the award of pre-judgment interest.

1. Appellee seeks dismissal of this appeal on the ground that actions taken by appellant have rendered the questions raised on the appeal moot. See OCGA § 5-6-48 (b) (3). Specifically, appellant has suspended payment of dependent death benefits previously awarded under the workers' compensation portion of the Longshoremen's & Harbor Workers' Compensation Act (33 USCA § 909) on the ground that a judgment had been obtained in the case at bar for the

amounts due. Appellee maintains that appellant's admission that a final judgment has been obtained is inconsistent with its present appellate position seeking reversal of that judgment, and that therefore appellant's suspension of payments moots any appeal. We disagree. While appellant's actions may be improper and untimely, that is a matter which should be taken up in the forum in which the dependent death benefits were awarded. The action does not moot an appeal from the judgment rendered in a state court on a negligence verdict.

2. "After verdict and judgment, it is too late to review a judgment denying a summary judgment, for that judgment becomes moot when the court reviews the evidence upon the trial of the case.' [Cits.]" *Stone Mountain Pool &c. Co., v. Imperial Pool Co.,* 170 Ga. App. 283 (2) (316 SE2d 769) (1984). Thus, appellant's contentions concerning the denial of its motion for summary judgment will not be pursued further.

3. 33 USCA § 905 (b) permits a longshoreman or harbor worker who suffers injury "caused by the negligence of a vessel" to "bring an action against such vessel," and 33 USCA § 902 defines "vessel" to include the vessel's owner pro hac vice. A covered worker may bring such a negligence action against the vessel even if that vessel is also the employer of the injured worker. *Jones & Laughlin Steel Corp. v. Pfeiffer,* 462 U.S. 523 (103 SC 2541, 76 LE2d 768, 780) (1983).

In one of its enumerated errors, appellant contends that the appropriate standard of negligence was not met in the case at bar. Appellant argues that case law requires knowing and affirmative negligence on the part of the vessel before a recovery may be sustained. However, *Spence v. Mariehamns R/S,* 766 F2d 1504 (11th Cir. 1985), and each of the remaining cases cited as support by appellant concern a factual situation in which the offending vessel was actually being unloaded and control of the area in which the injury was sustained had been given to the stevedores/longshore-

men. See *Wild v. Lykes Bros. Steamship Corp.*, 734 F2d 1124 (5th Cir. 1984); *Helaire v. Mobil Co.*, 709 F2d 1031 (5th Cir. 1983); *Cavalier v. T. Smith & Son, Inc.*, 668 F2d 861 (5th Cir. 1982). See also *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (101 SC 1614, 68 LE2d 1) (1981). Those facts are not present in the case at bar where the decedent was not loading or unloading appellant's vessel when he suffered his fatal injury. The *Scindia* standard is inapplicable to a factual setting involving a vessel-connected hazard that antedates the commencement of the cargo operations. *Pluyer v. Mitsui O. S. K. Lines, Ltd.*, 664 F2d 1243, 1246 (5th Cir. 1982). Appellant owed the decedent a duty to operate its vessel in a non-negligent manner, and there was sufficient evidence from which the jury could conclude that appellant knowingly permitted its vessel to be piloted by an unlicensed operator who approached the construction site at too great a speed and hit a barge, causing guy ropes to break and a steel cage to fall on and crush appellee's decedent. See also *Duncan v. Dravo Corp.*, 426 FSupp. 1048 (7) (W.D. Pa. 1977).

4. Appellant complains that the judgment against it cannot stand because any negligence which resulted in decedent's death was caused by a fellow servant engaged in a single mission with the decedent. The statute under which appellee's predecessor filed suit, 33 USCA § 905 (b), specifically prohibits a negligence action if the injured party was employed to provide stevedoring services and the injury was caused by the negligence of others engaged in providing stevedoring services to the vessel. The statute similarly forbids negligence suits by shipbuilders or repairers whose injuries were caused by the negligence of persons also engaged in shipbuilding or repairing. "For the [§ 905 (b)] exemption to apply in any event, the injured worker and the negligent employee must both have been performing the same function, whether it be longshoring, shipbuilding, repair work, or . . . some other task." *Smith v. Eastern &c. Pile*

Driving, Inc., 604 F.2d 789, 797 (2d Cir. 1979). "The shipowner is only relieved of liability if the injury to the harbor worker resulted from negligent acts by other employees performing the same services. Thus, the relevant nexus between the negligent party and the victim is not whether they were working aboard the same vessel, but whether they were working at the same task such that both would have been employed by an intermediary employer had the shipowner chosen to contract out the work." Id., at 796, n. 7. "Where the injury is due to negligence of the shipowner-employer in non-stevedoring [or non-building or non-repairing] operations, then [the second and third sentences] of § 905 (b) [do] not act as a bar." *Chiasson v. Rogers Terminal & Shipping Corp.*, 679 F2d 410, 415 (5th Cir. 1982). In the present case, the decedent was engaged in longshoring activities at the time of his death (see *Browning v. B. F. Diamond Constr. Co.*, 676 F2d 547, at 549-550), and the negligent party was improperly piloting a tugboat. Had the longshoring activity been contracted out, the decedent would have been an employee of the stevedore while the pilot of appellant's vessel would have been appellant's agent. Therefore, contrary to appellant's assertions, the tugboat pilot and the decedent were not involved in a single mission which would have precluded appellee's suit against appellant.

5. In its final enumerated error, appellant protests the imposition of pre-judgment interest on the jury's verdict. Appellant concedes that pre-judgment interest in admiralty cases generally is granted, barring exceptional or peculiar circumstances, and that the decision whether or not to award such interest lies with the discretion of the trial court. See *Helaire v. Mobil Oil Corp.*, supra, at 1042. Appellant maintains that the trial court abused its discretion when it failed to consider the fact that appellee did not comply with Georgia law concerning pre-judgment interest. However, where a claim, such as the one at bar, is governed by federal law, the question whether pre-judgment interest will be

allowed is not controlled by the law of the forum state. Thus, compliance with the Georgia Unliquidated Damages Interest Act (OCGA § 51-12-14) was not a prerequisite to an award of pre-judgment interest. See *George R. Hall, Inc. v. Superior Trucking Co.*, 532 FSupp. 985, 996 (N. D. Ga. 1982).

Appellant also argues that the case at bar involves peculiar circumstances which mandate a denial of pre-judgment interest, i.e., the existence of a genuine dispute regarding ultimate liability and the complexity of factual and legal issues to be resolved. "Although the presence of a genuine and serious dispute is a factor for the court to consider in exercising its discretion [cit.], it does not alone mandate a finding of abuse of discretion. [Cit.]," *Miller Indus. v. Caterpillar Tractor Co.*, 733 F2d 813, 823 (5th Cir. 1984). We conclude that the trial court's award of pre-judgment interest was not an abuse of discretion.

Judgment affirmed. Banke, C. J., and McMurray, P. J., concur.